IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 362 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAVJI PARSING BHABHOR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 362 of 1995

MR YATIN SONI for Petitioners No. 1-6

..... for Petitioners No. 7-9

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 12/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellants of this appeal have approached this Court for challenging the judgment and order of conviction and sentence passed by the Ld. Addl. Sessions Judge, Panchmahals at Godhra in Sessions Case No. 179 of 1993 whereby they have been sentenced to suffer RI for life and fine of Rs.500/- in default RI for one month for offence u/S. 302 of the Indian Penal Code (for short 'IPC') read with sections 147, 148, 149 and also section 34 of the IPC. They have also been convicted for the offence u/Ss. 323, 326 and 337 of the IPC for which no separate sentence has been passed.

2. The facts in short leading to the present prosecution case are as follows :-

2.1. On 15th July, 1993 in the evening at about 5 O'clock prosecution witness Surmaben was grazing her buffalos in the field. At that time appellant no.2 gave filthy abuses to her and, therefore, Surma called her father Khimajibhai, who is the deceased in this case. Khimajibhai came there and he told appellant no. 2 not to speak abuses. Appellant no. 2, therefore, got enraged and he delivered one stick blow on the head of deceased Khimajibhai. Immediately thereafter appellant no. 1 gave a blow with butt of the gun on the chest of deceased. Appellant no. 3 who was also present there gave two stick blows, one on the forehead and the other on the back of Khimajibhai. Appellant no. 4 pelted stone at Surma which hit her on the left hand. Appellant no. 3 gave a blow with sword on the head of prosecution witness Lalsing Ganglabhai. Appellant no. 2 gave a stick blow on the chest of Gangla Fulabhai. He also caused injury to Ganglabhai Fulabhai with stick. Victims raised shouts calling for help and on hearing them, Chokhla Puna Machhar, Mansukh Sona Machhar and Manji Mana came there. The assailants immediately left the place. The injured persons were taken to Sukhsar hospital and they were treated there. Khimajibhai was, however, transferred to Santrampur hospital for taking his X-ray, etc. and for further treatment. The other injured persons were treated as outdoor patients at Sukhsar and they were allowed to go on the same day. The Medical Officer at Santrampur found the condition of Khimaji critical and, therefore, he was transferred to Civil Hospital at Godhra. Khimaji died on 18th July, 1993 at Godhra hospital.

2.2. In the meanwhile the FIR came to be lodged at

Sukhsar Police Station outpost on 15th July, 1993 at about 10.15 p.m. On receipt of the FIR offence came to be registered against the appellants and usual investigation was started. During the course of investigation, the appellants came to be arrested, necessary panchnamas came to be drawn and the statements of various persons acquainted with the facts of the case came to be recorded. The Investigating Officer also got the post mortem done of the dead body and got prepared the map of scene of offence. On completion of the investigation, charge-sheet came to be filed in the Court of the Ld. J.M.F.C. at Santrampur, who in turn committed the case to the Court of Sessions as offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Addl. Sessions Judge, Panchmahals at Godhra framed charge at Exh.1 against appellants for offences u/S. 302 and u/S. 302 read with sec. 34 and for offences u/Ss. 147, 148 and 149 of the IPC and also for offences u/Ss. 326, 323 and 337 of the IPC and for offences u/Ss. 504 and 323 read with section 114 of the IPC. Charge for offence u/S. 135 of the Bombay Police Act was also framed against all the appellants. The appellants denied the charge and claimed to be tried.

4. The prosecution, to establish its case against the appellants, examined (1) Dr. Sumanben Malabhai Damor P.W. 1 Exh.15, (2) Dr. Lalsinh Gulabsing Ravat P.W.2 Exh. 21, (3) Bhimabhai Rangabhai Mal P.W. 3 Exh. 28, (4) Prabhakar Ramubhai Bhatia P.W. 4 Exh. 31, (5) Mansing Navla Mal P.W.5 Exh. 36, (6) Surmaben Khimajibhai P.W. 6 Exh. 38, (7) Lalsing Ganglabhai P.W. 7 Exh. 39, (8) Chhaganbhai Tejabhai P.W.8 Exh. 41, (9) Shantubhai Motibhai Machhar P.W.9 Exh. 42, (10) Surajbhai Jagjibhai P.W. 10 Exh. 43, (11) Gangla Fulabhai P.W. 11 Exh. 44, (12) Laxmansinh Surchand P.W. 12 Exh. 45 and (13) Pramodsinh Fatesinh Gohil P.W. 13 Exh. 46. Over and above this, the prosecution also placed reliance on certain documentary evidence such as medical certificates of injured witnesses and the deceased, the FIR, etc. At the end of recording of the evidence the appellants were put circumstances appearing against them in evidence u/S. 313 of the Code of Criminal Procedure to enable them to offer any explanation, if they so desired and in response to that they have not come out with any specific case but their defence appears to be that of general denial.

5. At the end of the trial, the Ld. Judge came to the conclusion that the prosecution has successfully

established all the charges levelled against the appellants beyond any reasonable doubt and, therefore, he convicted them for various offences and awarded sentence for RI for life as already stated above.

6. Mr. Yatin Soni, learned counsel appearing for the appellants and Mr. H.H. Patel. Ld. APP appearing for the State have taken us through the record of the case and in particular depositions of certain witnesses on whom heavy reliance has been placed by the prosecution. Mr. Soni has submitted that the conviction and order of sentence recorded by the trial Court are erroneous and not legal in as much as the prosecution has failed to prove its case against the appellants. He has further submitted that the conviction recorded by the trial Court for offences u/Ss. 147, 148 and 149 of the IPC is not proper because though there were more than five persons, they did not have any common object to fulfil. He has further submitted that looking to the facts and circumstances of the case, only appellant no. 2 could have been held responsible for the head injury and conviction of other appellants with the aid of section 34 of the IPC was not justified. Lastly he has submitted that even if this Court come to the conclusion that the appellants have committed offences, then at the most the appellant no. 2 could be saddled with responsibility of committing offence u/S. 304 Part I or II and not u/S. 302 of the IPC. So far the other appellants are concerned, he has submitted that they should be held liable for committing their individual acts.

6.1. As against that, Mr. H.H. Patel, Ld. APP has submitted that the appellants with a view to commit assault on the deceased and other prosecution witnesses, got collected at the scene of offence and immediately after the initial assault on Khimaji by appellant no. 2, they assaulted the deceased as well as the prosecution witnesses and, therefore, they were members of unlawful assembly and vicariously liable for committing principal offence u/S. 302 of the IPC. He has further submitted that considering the facts on record, it is very clear that the assault on victims by the appellant was as a result of the common object or common intention shared by the appellants and, therefore, the application of section 149 and section 34 of the IPC is proper and justified. Lastly he has submitted that the appeal has no merit and it deserves to be dismissed.

7. We have gone through the record of the case and appreciated the oral as well as documentary evidence

appearing on the record afresh.

7.1. So far the question whether the deceased died homicidal death is concerned, the prosecution has relied on medical evidence in the form of P.Ws. 1 and 2 and also the medical certificates and post mortem notes. P.W. 1 Dr. Sumanben Malabhai Damor has stated that she had examined Khimajibhai Ganglabhai on 15th July, 1993 at about 10.00 p.m. She had found swelling on the right side of the forehead in the area of 5 cm x 2 cm and she had also found that the condition of the patient was very critical. She, therefore, advised that the patient be transferred to Santrampur hospital. She also issued medical certificate which is at Exh.20 on the record of the case. According to her, the injury to Khimaji could be caused by hard and blunt substance. The second witness examined on this aspect is Dr. Lalsinh Gulabsing Ravat. According to him, on 16th July, 1993 he was incharge Medical Officer at State Hospital, Santrampur. At about 11.30 a.m. Khimajibhai Ganglabhai was brought to this hospital by his relatives and he was admitted as indoor patient. According to him, on examining the injured, he had found swelling on the right hand side of the forehead. He also got the X-ray taken and found that there was fracture of right side frontal and temporal bone. Since he found the condition of the patient very serious, he referred him to Civil Hospital at Godhra. At Godhra the patient was admitted where he died on account of the injuries suffered by him. The prosecution has examined Dr. Prabhakar Ramubhai Bhatia, P.W. 4 Exh.31, Medical Officer, Godhra, who has deposed about the post mortem examination of the deceased. The post mortem examination commenced at about 2.00 p.m. and was completed at 4.00 p.m. on 18th July, 1993. The examination showed that there was a swelling on the right side of head and there was corresponding fracture of the skull bone inside the head. He has also deposed that there was abrasion on the back of the deceased which measured 1/2 x 1/3 cm. According to this witness, the injuries were anti mortem and they were sufficient in ordinary course of nature to cause death. He has further opined that these injuries could be caused with stick. In the cross-examination he has stated that when the deceased was brought to Godhra hospital for treatment, he was found to be in unconscious condition. He has further stated that injury no. 1 could be described as multiple fracture. He has also opined that if the deceased had been given timely treatment, his life could have been saved.

7.2. The aforesaid evidence of three medical officers

as well as the post mortem notes and the medical certificate of Khimaji clearly show that he did not dye natural death but he died because of the assault carried out on him by the assailants. The prosecution has, therefore, established the fact that he had died homicidal death.

8. With a view to fix the responsibility of the appellants for committing this crime, the prosecution has heavily relied on the evidence of Mansing Navla Mal P.W. 5 Exh. 36, who has stated that at the time of incident he was at his home. In the evening after about 4 O'clock Khimaji's daughter Surma was grazing buffalos in the field and at that time appellant no. 2 gave filthy abuses to Surma. Surma, therefore, called her father Khimaji, who came there and asked appellant no. 2 not to speak abuses. He, therefore, got enraged and immediately gave a stick blow on his head. This attack on the deceased was immediately followed by attack by other appellants who had gathered there and they started beating the deceased as well as other prosecution witnesses. According to this witness, Khimaji had received serious injuries and, therefore, he was taken to hospital alongwith other injured persons, but thereafter from Sukhsar he was transferred to Santrampur and from there to Godhra, where he died on 18th July, 1993. In the cross-examination of this witness, the defence has not able to take out from him any material of importance from its point of view. However, it appears from the evidence of this witness that he may not have witnessed this incident personally. According to this witness, there was a long standing land dispute going on between the parties.

8.1. The second witness is Surmaben Khimajibhai P.W. 6 Exh.38. This witness has narrated in detail what transpired on the fateful day. She has stated that while she was grazing the buffalos appellant no. 2 gave her filthy abuses and, therefore, she called Khimajibhai. When Khimajibhai came there he asked appellant no. 2 not to speak abuses, but he instead got enraged and gave stick blow on his head. Thereafter, different appellants also caused injuries to the deceased as well as other prosecution witnesses. According to her appellant no.1 Ravji Parsing gave pushes with the butt of gun to the deceased, whereas Valsing Parsing gave blow with stick on the back of the deceased. Thereafter, the other appellants caused injuries to some of the persons present there. In the cross-examination this witness has stated that the injured was removed to hospital at Sukhsar and from there he was taken to Santrampur hospital and lastly

at Godhra, where he succumbed to the injuries on 18th July, 1993. Nothing of any importance has been brought out by the defence from the cross-examination of this witness.

8.2. We have also examined the evidence of Lalsing Ganglabhai P.W. 7 Exh. 39, who has deposed more or less on the same line. He has stated that in the incident he had received injury on the head which was caused by appellant no. 3 - Valsing Parsing. He has also stated that appellant no. 2 - Moti Parsing had caused injuries to Gangla Fula with stick and Galji Parsing had caused injuries to Surmaben on left hand. In the cross-examination this witness has been put questions on the fact that there was long standing land dispute going on between the parties. Further the suggestions have been made to this witness by the defence saying that they have not received any injuries in this incident and that the incident of which he had deposed to had never taken place. He has, however, denied these suggestions.

9. The prosecution has also relied on certain other evidence oral as well as documentary, but for deciding this appeal, the same is not very relevant and we, therefore, do not discuss the same in detail here.

10. Considering the evidence stated above, it becomes clear that the deceased had died homicidal death and the prosecution witnesses Surmaben, Lalsing, Gangla, Ganglabhai Fulabhai had received injuries which have been duly described on their respective medical certificates which have been brought on record by the prosecution. Secondly the prosecution is also able to prove that incident in which the aforesaid persons came to be injured and ultimately Khimajibhai died had taken place on 15th July, 1993 at about 5.00 p.m. in the field on account of grazing buffalos by Surmaben. The prosecution has also been successful enough to prove the fact that initially appellant no. 2 Moti Parsing gave abuses to Surmaben and she, therefore, called her father, who asked appellant no. 2 not to speak abuses. Appellant no. 2, therefore, got enraged and gave one stick blow on the head of Khimajibhai. This was immediately followed by assault by other appellants on the victims and this fact is also duly established by the prosecution. In the circumstances we have no hesitation to hold that the appellants were responsible for carrying out assault on the deceased as well as other prosecution witnesses.

11. The question therefore now remains to be decided is whether the offence committed by appellant no. 2 is

one u/S. 302 of the IPC or any lesser offence than that and secondly whether other appellants could be convicted for that offence by virtue of sections 147, 148 and 149 of the IPC and or section 34 or section 114 of the IPC.

12. The evidence of Surmaben, who was very much present at the time when the assault came to be made on her father, has stated that appellant no. 2 first gave one blow on the head of Khimajibhai with stick. The others later on assaulted the deceased and other prosecution witnesses. It, therefore, becomes very doubtful whether the appellants had any common object already formed by them to cause death of Khimaji and cause injuries to other persons. No doubt, unlawful assembly can be formed at the spot, but looking to the nature of the evidence, the same does not appear to be so. It is found from the prosecution evidence that initially whatever the dialogue that took place between the deceased and appellant no. 2 it is not sure whether the other appellants were standing by the side of appellant no.2. On the contrary, it appears that they came to the scene little later and they carried out their individual assault on the deceased and other witnesses. The second aspect is that the prosecution witness Surmaben was grazing buffalos at the time of incident and it is quite possible that the buffalos might have transgressed the limits of Surmaben's field and might have entered upon the land of appellant no.2 and that could be the reason why appellant no. 2 started giving filthy abuses. The incident that followed, therefore, was not as a result of any predetermined plan. It happened all of a sudden and appellant no. 2 because of the cattle grazing in his field got enraged which feeling was further increased by deceased telling him not to speak abuses and in that heat moment he delivered one blow on the head of the deceased. The other assault on the deceased as well as other witnesses is alleged to have been carried out little later. However, so far the assault on deceased by other appellants is concerned, the prosecution has failed to prove the same because no such injuries have been found either on the chest or on the back of the deceased which could have been caused by butt of the gun or the stick. We are, therefore of the opinion that the other appellants cannot be saddled with the responsibility of committing the principal offence on account of the vicarious liability arising by virtue of being member of unlawful assembly or by virtue of section 34 or section 114 of the IPC. The prosecution has not been able to prove beyond reasonable doubt that the appellants had committed any offence u/Ss. 147 to 149 of the IPC.

12.1. So far appellant no. 2 is concerned he cannot be convicted for offence u/S. 302 of the IPC in as much as the facts and circumstances on record clearly show that the attack on deceased was caused without any premeditation and in the heat of passion upon sudden quarrel. The facts also show that the appellant no. 2 had not taken any undue advantage of the situation and he had not acted in a cruel manner in as much as only one blow was given on the forehead. In our opinion, his case is therefore, covered under exception (4) to section 300 of the IPC and it would be an offence covered u/S. 304 Part-I of the IPC and not u/S. 302 of the IPC. The conviction of appellant no. 2 therefore, deserves to be altered from one u/S. 302 of the IPC to that u/S. 304 Part-I of the IPC. We find that the Ld. trial Judge has not taken this aspect into consideration and to that extent he has committed error in arriving at the conclusion that offence committed by appellant no. 2 is one punishable u/S. 302 of the IPC. So far the other appellants are concerned, since we have held that they could not be held guilty for committing principal offence with the aid of either section 34 or section 114 of the IPC, they could be at the most held responsible for committing the individual offences, which could be covered u/Ss. 323 and 324 of the IPC.

12.2. So far the question of awarding sentence is concerned, we find that the appellants nos. 1, 2 and 3 have served actual imprisonment for more than six and half years. In our opinion, the ends of justice would meet if appellant no. 2 is imposed sentence already undergone. So far the other appellants are concerned, they have already served the imprisonment more than the prescribed under the IPC for their respective offences and net result thereof is that they are not required to suffer any further imprisonment on account of their conviction for the respective offences.

13. In the result, this appeal partly succeeds. We, therefore, convict appellant no. 2 for offence u/S. 304 Part-I of the IPC and imposed sentence which he has already undergone. We also convict appellant no. 4 for offence u/S. 323 and appellant no.3 for offence u/S. 324 of the IPC and they are sentenced to suffer RI for a term of six months. The rest of the appellants are acquitted of all the offences with which they are charged. As the convicted appellants have already served out their respective sentences, they are ordered to be

set at liberty forthwith unless they are required for any other offence.

[K.R. VYAS, J.]

[AKSHAY H. MEHTA,J.]

* Pansala.